

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION**

ROBERTO HERNANDEZ,

Plaintiff,

v.

USA,

Defendant.

§
§
§
§
§
§
§
§
§
§

CIVIL ACTION NO. 5:17-CV-00205-RWS

ORDER

Movant Roberto Hernandez, a former prisoner, proceeding *pro se*, filed this motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. The Court referred this matter to the Honorable Caroline Craven, United States Magistrate Judge, at Texarkana, Texas, for consideration pursuant to applicable laws and orders of this Court. The Magistrate Judge recommends denying the motion to vacate, set aside, or correct sentence. Docket No. 9.

The Court has received and considered the Report and Recommendation of United States Magistrate Judge filed pursuant to such order, along with the record, pleadings and all available evidence. A copy of the Report and Recommendation was mailed to Mr. Hernandez at his last known address at the D. Ray James Facility on November 26, 2019. Mr. Hernandez's copy of the Report and Recommendation was returned to the Court as undeliverable on January 2, 2020, with a notation that Mr. Hernandez is no longer at that facility and there was no forwarding address. A BOP inmate locator search for Mr. Hernandez indicates that he was released on June 1, 2018. Though the docket indicates that Mr. Hernandez, after filing his motion, received prose guidelines

including information on reporting changes of address to the court, he has not provided the Court with his current address.

Because no objections to the report have been received, Mr. Hernandez is not entitled to *de novo* review by the District Judge of the Magistrate Judge's findings, conclusions and recommendations, and except upon grounds of plain error, he is barred from appellate review of the unobjected-to factual findings and legal conclusions accepted and adopted by the District Court. 28 U.S.C. § 636(b)(1)(C); *Douglass v. United Servs. Auto. Assoc.*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).

Nonetheless, the Court has reviewed the pleadings in this cause and the report of the Magistrate Judge and agrees with the report of the Magistrate Judge. *See United States v. Raddatz*, 447 U.S. 667, 683 (1980) (“[T]he statute permits the district court to give to the magistrate’s proposed findings of fact and recommendations ‘such weight as [their] merit commands and the sound discretion of the judge warrants’”) (quoting *Mathews v. Weber*, 23 U.S. 261, 275 (1976)).

Additionally, Hernandez is not entitled to the issuance of a certificate of appealability. An appeal from a judgment denying federal habeas corpus relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253; FED. R. APP. P. 22(b). The standard for granting a certificate of appealability, like that for granting a certificate of probable cause to appeal under prior law, requires the movant to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1982). In making that substantial showing, the movant need not establish that he should prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a

court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. If the motion was denied on procedural grounds, the movant must show that jurists of reason would find it debatable: (1) whether the motion raises a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484; *Elizalde*, 362 F.3d at 328. Any doubt regarding whether to grant a certificate of appealability is resolved in favor of the movant, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir. 2000).

Mr. Hernandez has not shown that any of the issues raised by his claims are subject to debate among jurists of reason, or that a procedural ruling is incorrect. In addition, the questions presented are not worthy of encouragement to proceed further. Thus, the movant has failed to make a sufficient showing to merit the issuance of a certification of appealability.

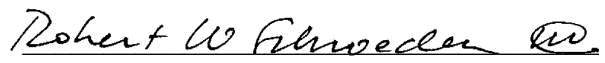
It is accordingly

ORDERED that the Magistrate Judge's report (Docket No. 9) is **ADOPTED** as the opinion of the District Court. It is further

ORDERED that Mr. Hernandez's motion to vacate, set aside or correct sentence is **DENIED**. Finally, it is

ORDERED that any and all motions which may be pending in this civil action are hereby **DENIED-AS-MOOT**. A certificate of appealability will not be issued.

So ORDERED and SIGNED this 19th day of May, 2020.


ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE